



## Memorandum

**Date**

March 21, 2017

**To** Amy Salinas

**From**

Constance Courtney Westfall

**Re** Delta Shipyards Site – Lack of CERCLA Jurisdiction

**Issue:** Does the United States Environmental Protection Agency's ("EPA") have jurisdiction over the Delta Shipyards Site?

**Short Answer:** No. Contrary to the Hazardous Ranking Score ("HRS") Documentation Record, the Delta Shipyards Site consists of waste pits that were used by Delta Mud for oil-field drilling material. Oil-field drilling material is exempt from the definition of CERCLA hazardous substance, and, as such, cannot be the subject of a cleanup under CERCLA.<sup>1</sup>

### **I. FACTS**

The EPA listed the Delta Shipyards Site ("Site") on the National Priorities List on September 22, 2014, through its informal rulemaking authority. 79 Fed.Reg. 56515, 56522 (2014). The supporting documentation for the NPL listing described the Site as "waste filled open pits and an adjacent drainage ditch that resulted from the **Delta Shipyards operations**."<sup>2</sup> In turn, Delta Shipyard's operations were summarized:

Delta Shipyard consisted of a cleaning and repair facility for small cargo boats, fishing boats, and oil barges. Before repair work could begin, the boats had to be certified vapor free by the U.S. Coast Guard. To accomplish this, the boats were first steam cleaned to remove oily wastes. Recovered oil that was still deemed usable was recovered and sold. The remaining oily waste from the cleaning process was stored in several unlined earthen pits used as evaporation ponds. These pits were reportedly also used to dispose of oil-field drilling material.<sup>3</sup>

<sup>1</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

<sup>2</sup> U.S. ENVTL. PROTECTION AGENCY, HAZARD RANKING SYSTEM DOCUMENTATION RECORD, Site Summary ("HRS Summary") p. 6 (emphasis added).

<sup>3</sup> *Id.*



In January 2017, the EPA interviewed a former employee and learned that the pits were not associated with Delta Shipyards, but with Delta Mud. The HRS Documentation Record therefore is incorrect in attributing the wastes to Delta Shipyard. Further, the former employee's account is consistent with the historic documents in the HRS Documentation Record. For instance, the State of Louisiana noted in 1986 that the "large open impoundment" (the subject of the NPL listing, as depicted on the State's diagram) was "not associated with the gas free operation" of Delta Shipyard.<sup>4</sup> A 1985 report states, "According to our research, all sites (the subject of the NPL listing) were once used to dispose of oil field drilling material."<sup>5</sup>

The chemical composition confirms the wastes' origin as samples contain up to 30% percent oil and the levels of barium are consistent with drilling mud.

## II. LEGAL ANALYSIS

### A. EPA's Jurisdiction Over Potentially Liabile Parties Under CERCLA: Hazardous Substances.

1. Oil & Gas Exemptions. The jurisdiction of the EPA is derived from statute. See *National Pork Producers Council v. United States Environmental Protection Agency*, 635 F.3d 738 (5th Cir. 2011). A number of the environmental statutes the EPA administers contain exemptions for the oil and gas industry, including CERCLA and RCRA. The basis for such an exemption is that other state and federal regulatory programs address the industry.<sup>6</sup>

2. Oil & Gas Exemptions Under CERCLA & RCRA. Under CERCLA Section 107, a party may be liable for cleanup of a release of a "hazardous substance."<sup>7</sup> The definition of "hazardous substance"<sup>8</sup> excludes "petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as a hazardous

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<sup>4</sup> HRS Documentation Record, References Cited: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY, *General Inspection, Delta Shipyards, Homa, Terrgonne Parish* (April 16, 1986).

<sup>5</sup> HRS Documentation Record, References Cited: Wink Engineering, *Letters to Louisiana Department of Environmental Quality Regarding Delta Shipyards' Waste Sites at Houma and Duson, LA* (1985).

<sup>6</sup> See e.g., 53 Fed. Reg. 24,557 (1988).

<sup>7</sup> 42 U.S.C. § 9607.

<sup>8</sup> 42 U.S.C. § 9601(14). EPA created a master list of these hazardous substances, codified at 40 C.F.R. § 302.4.



substance under subparagraphs (A) through (F) of this paragraph.” The reference to “subparagraphs (A) through (F)” reflects the various lists developed under a number of other federal environmental statutes, including RCRA, that make up the definition of CERCLA “hazardous substance.”

In turn, RCRA exempts exploration and production wastes (“E&P wastes”). Specifically, RCRA exempts “drilling fluids, produced waters, and other wastes associated with the exploration, development or production of crude oil or natural gas.”<sup>9</sup>

Drilling mud or “drilling fluids,” such as that associated with Delta Mud is specifically exempt from both RCRA and CERCLA. See *Center for Biological Diversity v. BP America (In re Oil Spill by the Oil Rig “Deepwater Horizon”)*, 2015 U.S. Dist. LEXIS 125358 \*16-17 (E.D. La. 2015). The Center for Biological Diversity (the “Center”) sought to require BP to report the releases of certain hazardous substances from the *Deepwater Horizon*. The Center claimed that BP’s petroleum contains hazardous substances such as benzene, toluene and xylene, and that BP is required to report their release. *Id.* at \*6. The Center also argued that spacer fluid and drilling mud “vitiates” any application of the petroleum exclusion. *Id.* at \*7-8. Further, the Center maintained that in the event the petroleum exclusion applied to spacer fluid and drilling fluids, such an exclusion was inapplicable because these fluids had not been used for a “bona fide exploration or production purpose.” *Id.* at \*8-9.

The Court made short work of the Center’s arguments since they were inconsistent with the plain meaning of the statutes and their legislative history. First, the presence of hazardous substances in the petroleum, spacer fluid and drilling mud did not transform this otherwise exempt release into one that was regulated. Such an interpretation, the Court found, “renders a portion of the statute superfluous.” *Id.* at \*12.

Next, the Court addressed the Center’s argument that the hazardous substances contained within the spacer fluid and drilling mud subjected this waste to regulation. The Court found:

“[S]pacer fluid and **drilling mud are not hazardous substances under CERCLA**. The EPA determined that drilling fluids are excluded from RCRA’s definition of hazardous waste. 40 C.F.R. §261.4(b)(5)(2015) (“Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy” are not hazardous wastes). Therefore, **drilling fluids**

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<sup>9</sup> 42 U.S.C. § 6921(b)(2)(A). The EPA regulations exempted E&P wastes even before the enactment of the statutory exemption. 43 Fed. Reg. 58946, 59016 (December 18, 1978); see 40 C.F.R. §261.4(6).



**are not considered hazardous substances under CERCLA.** See 42 U.S.C. §9601(14)(definition of hazardous substance).

*Id.* \*16-17 (emphasis added).

Finally, the Court disposed of the Center's contention that the spacer fluid and drilling mud were not exempt from the definition of "hazardous substance" because they had not been used for "'bona fide' exploration, development, or production purposes." *Id.* \*17. The Court held that "the exemption does not require such a 'bona fide' purpose, nor does it consider the intent of the party using the drilling fluids. It only requires the wastes to be 'associated' with the exploration, development or production of crude oil, natural gas, or geothermal energy, which they plainly were." *Id.*

**B. EPA's Lack of Jurisdiction Over Delta Mud's Pits.**

The decision in *Center for Biological Diversity* is particularly probative as applied to Delta Mud as it not only addresses its wastes, but also the opinion was issued by the court with jurisdiction over the Site, the United States District Court for the Eastern District of Louisiana. Delta Mud's wastes were plainly "associated" with the exploration, development, or production of crude oil or natural gas as that was its business. Such wastes are exempt from the definition of "hazardous substances." The fact that such exempt wastes otherwise contain hazardous substances does not negate their exemption from CERCLA jurisdiction.

**C. EPA's Lack of Jurisdiction Over Delta Mud's Pits Substantiated by Witness and Historic Documents is "Sufficient Cause" Under Section 107(c)(3).**

A "sufficient cause" defense<sup>10</sup> requires objective evidence that supports the reasonableness and good faith of a party's belief that it is not liable under CERCLA. See *United States v. DWC Trust Holding Co.*, 812 F.2d 383, 392 (D. Md. 1996); see also *In re Tiger Shipyard*, CERCLA 106(b) Petition No. 96-3, Preliminary Decision (EAB, April 24, 2001)(EPA ordered to reimburse PRP). In this case, the party and the EPA learned from a witness that the wrong business was the subject of the NPL listing, with regulatory repercussions. Simply stated, the barge and boat cleaning industry, the business at the focus of the NPL listing, does not have its own exemption from major environmental statutes.

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<sup>10</sup> 42 U.S.C. § 9607(c)(3).



**III. CONCLUSION**

The Delta Shipyards Site consists of waste pits that were used by Delta Mud for oil-field drilling material. Such oil-field drilling material is exempt from the definition of CERCLA hazardous substance and the EPA lacks jurisdiction to require a cleanup.